Office - Supreme Court, U. S.
FILED
JAN 18 1952
CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1951

No. 544

ROBERT L. RICHARDS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT WITH BRIEF IN SUPPORT THEREOF.

JOSIAH LYMAN,
711 14th Street, N. W.,
Washington, D. C.

KATHRYN M. SCHWARZ,
1346 Connecticut Ave. N.W.,
Washington, D. C.
Attorneys for Petitioner

SOPHIE B. LYMAN
711 14th Street, N. W.,
Washington, D. C.
Of Counsel

WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

INDEX

PAGE

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit 1

Opinions Below 1

Jurisdiction of this Court 2

Questions Presented 2

Statutes Involved 3

Statement of the Matter Involved 3

Reasons for Granting the Petition and Allowing the Writ 4

Prayer 6

Brief in Support of Petition 7

Opinion of the Court Below 7

Jurisdiction of this Court 7

Statutes Involved 8

Specification of Errors 8

Statement of the Case 9

Argument 10

1. The trial Court erred in allowing the Prosecutor to impeach the credibility of the defendant as a witness in his own behalf 10

2. The trial Court erred in allowing the prosecutor to argue wholly irrelevant facts and issues not based on any evidence, and only for the purpose of arousing suspicion, passion and prejudice against the defendant in the minds of the jury 14

Conclusion 16

PAGE

Cases Cited

Bennett v. U. S., 88 Ct. Cl. 602 13
Berger v. U. S., 295 U. S. 78 ..... 5, 15
Boyd v. U. S., 142 U. S. 450 ..... 5, 12
Carlisle v. U. S., 16 Wall. 147, 83 U. S. 426 ..... 4, 11, 12
Ex parte Garland, 4 Wall. (71 U. S.) 333 ..... 4, 5, 11, 12
Ex parte Wells, 18 How. (59 U. S.) 307, 315 ..... 5, 12
In re Ringnalda, 48 F. Supp. 975 13
Osborn v. U. S., 91 U. S. 474 ..... 5, 12
U. S. v. Commanding Officer of 78th Division, U.S.A. 252 F. 314 13
U. S. ex rel Consola v. Karnuth, 27 F. Supp. 461, affirmed C. C. A. 108 F. 2d. 178 13
U. S. ex rel Palermo v. Smith, 17 F. 2d. 314 13
U. S. v. Klein, 13 Wall. (80 U. S.) 150 ..... 5, 12
U. S. v. Wilson, 7 Pet. (32 U. S.) 150 ..... 4, 12
Viereck v. U. S., 318 U. S. 236 ..... 5, 15
Young v. U. S., 97 U. S. 39 ..... 5, 12

Statutes Cited

Proclamation 2676, Granting Pardon to Certain Persons Who Have Served in the Armed Forces of the United States, Dated the 24th day of December 1945 ..... 3, 8

Constitution of U. S.

Article II, Section 2 12

Supreme Court of the United States

October Term, 1951

No. .....

ROBERT L. RICHARDS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Robert L. Richards, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case, affirming (R. 59) conviction of petitioner on an indictment charging grand larceny, in the United States District Court for the District of Columbia.

OPINION OF COURT BELOW

The opinion of the court below, decided September 27, 1951, has not yet been printed in an official volume and it appears on pages 46-58 of the record. Appellant's

petition for rehearing is set forth in the record at pages 60-66, and same was denied by order of the court below on December 19, 1951, (R. 67).

JURISDICTION OF THIS COURT

The opinion of the court below was entered on September 27, 1951, and its order denying petition for rehearing was entered December 19, 1951. The jurisdiction of this Court is invoked under Section 1254(1), Title 28, U. S. C., 28 U. S. C. A., 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals err in sustaining the trial court's ruling, permitting the government prosecutor to impeach the credibility of the defendant, who took the stand as a witness in his own behalf, by allowing said prosecutor, on cross-examination, before the jury, to ask and inquire about a prior conviction, when said defendant had, previously, prior to his indictment herein, received a full pardon from the President of the United States pardoning him of and from said prior conviction?

2. Did the Circuit Court of Appeals err in failing to find that the defendant's right to a fair and impartial trial was unlawfully prejudiced by the conduct and closing arguments of the prosecuor, who referred to and argued mainly, wholly irrelevant matters not related to the issues in the case, over objection of defendant, and calculated to arouse the suspicion, passion, and prejudice of the jury against the defendant and even his counsel? And further, did the Circuit Court of Appeals err in failing to find that the trial court below should have stopped the prosecutor, sua sponte, and upon objection of de-

fendant, from making such arguments which were solely designed to arouse the suspicion, passion and prejudice of the jury against the defendant.

STATUTES INVOLVED

Proclamation 2676, Granting Pardon to Certain Persons Who Have Served in the Armed Forces of the United States, Dated the 24th day of September, 1945. The full text of this Proclamation 2676 is set out at pages 42, 43, 44 of the record.

STATEMENT OF THE MATTER INVOLVED

The petitioner was indicted on a one count indictment (R. 3) charging him with grand larceny. During the course of the trial and the presentation of the defendant's case before the court and jury, the defendant took the witness stand to testify in his own behalf and defense. (R. 23-29). While on the witness stand, the prosecutor sought to impeach the credibility of the defendant as a witness by interrogating said defendant concerning a prior conviction of a crime against the United States allegedly committed on January 5, 1942. (R. 29). The prosecutor was permitted by the trial court to ask these questions of the defendant upon cross-examination, notwithstanding the fact that he and the court were aware that defendant had received a full pardon for this offense by the President of the United States on December 24, 1945. (R. 26, 27). The proclamation of pardon, pardoning the defendant, was offered in evidence (R. 42-44), as were the honorable discharges of the defendant from the United States Army (R. 41, 42).

At the conclusion of all evidence offered at the trial of the case, the prosecutor thereafter made his opening closing argument to the jury and subsequently made his

final rebuttal closing argument to the jury, after counsel for the defendant had addressed the jury. During the course of the prosecutor's opening closing argument and his rebuttal closing argument to the jury he repeatedly and continuously made prejudicial and wholly irrelevant statements calculated and designed only to arouse the suspicion, passion, and prejudice of the jury against the defendant (R. 31-36). During his closing arguments to the jury, the prosecutor did continuously and repeatedly, over objection of counsel, make baseless charges against and prejudicial remarks against the defendant and defendant's counsel, notwithstanding the fact that these baseless charges and prejudicial remarks uttered by the prosecutor before the jury were unsupported by competent evidence. (R. 31-36).

REASONS FOR GRANTING THE PETITION AND ALLOWING THE WRIT

Petitioner respectfully submits that the foregoing questions, presented by the record, are of exceptional and far reaching general importance, and to secure uniformity of decision, are such as to justify a review by this court—this for the following reasons:

1. We submit that to permit the pardoned crime to be used by the government prosecutor on a trial for an entirely different offense seems to be inconsistent with the nature and effect of a full Presidential pardon. *Ex parte Garland*, 4 Wall. (71 U. S.) 333; *United States* v. *Wilson*, 7 Pet. (32 U. S.) 150; *Carlisle* v. *United States*, 16 Wall. 147, 83 U. S. 426.

Petitioner submits that to his knowledge and meticulous inquiry the precise question before this court raised in this petition and decided by the court below, has to date, not been decided by this Court.

The broad approach to this question raised by this petition seems to have been emphasized by this Court many times; and that broad approach seems to indicate and mean that a full pardon blots out of existence the guilt so that in the eye of the law the offender is as innocent as if he had never committed the offense, and further that a full pardon not merely releases the offender from the punishment prescribed for the offense, but that it obliterates, in legal contemplation, the offense itself; and further, that the pardon not only blots out the offense pardoned, but it also removes all its penal consequences; and thus we submit, a full pardon purges away all guilt for all purposes, and leaves the recipient from a legal standpoint, in the same condition as if the crime had never been committed. *U. S.* v. *Klein*, 13 Wall. (80 U. S.) 128; *Ex parte Garland*, 4 Wall. (71 U. S.) 333; *Osborn v. U. S.*, 91 U. S. 474; *Boyd v. U. S.*, 142 U. S. 450; *Young v. U. S.*, 97 U. S. 39; and *Ex parte Wells*, 18 How. (59 U. S.) 307, 315.

2. This Court has stated in clear and unequivocal language on more than one occasion in the past, that no government prosecutor may lawfully and with impunity, indulge in conduct and make final arguments to a jury, prejudicing the defendant's right to a fair trial; and that no government prosecutor shall, or may in effect, by his conduct and closing arguments to a jury, prejudice the defendant's right to due process of law. It is the duty of the prosecutor to see to it that the defendant not only be prosecuted fairly, but that he receive during the entire trial, a fair and just trial, unpunctuated by purpose, design, or conduct on his part, seeking to influence the jury against the defendant by raising passion, suspicion and prejudice in their minds. *Viereck v. U. S.*, 318 U. S. 236; and *Berger v. U. S.*, 295 U. S. 78.

Wherefore, petitioner respectfully prays that the writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia Circuit, commanding said Court to certify and send to this Court, for its review and determination on a day certain to be therein named a full and complete transcript of the proceedings of said Court herein, being entitled as follows: No. 10,700, Robert L. Richards, Appellant v. United States of America, Appellee, to the end that the records and proceedings therein be reviewed by this Honorable Court, and the judgment of said Circuit Court of Appeals be reversed, with directions to that Court to remand said cause to the District Court of the United States for the District of Columbia to set aside the judgment and sentence imposed upon petitioner, and for such further proceedings not inconsistent with the opinion and judgment of this Honorable Court, and for such other and further relief in the premises as to this Court may seem just and proper.

Respectfully submitted,

JOSIAH LYMAN,
711 14th Street, N. W.,
Washington, D. C.
KATHRYN M. SCHWARZ,
1346 Connecticut Ave. N.W.,
Washington, D. C.
Attorneys for Petitioner

SOPHIE B. LYMAN
711 14th Street, N. W.,
Washington, D. C.
Of Counsel

Supreme Court of the United States

October Term, 1951

No. .....

ROBERT L. RICHARDS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

BRIEF IN SUPPORT OF PETITION

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, announced September 27, 1951, not yet in official volume, is contained on pages 46-58 of the record.

Petitioner filed his petition for rehearing within time, and the same was denied on December 19, 1951. Said petition is contained on pages 60-66 of the record herein. The judgment of said appellate court affirmed the judgment and sentence of the trial court, the United States District Court for the District of Columbia (R. 59).

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, U. S. C. 28 U. S. C. A., 1254(1), 62 Stat. 928.

STATUTES INVOLVED

Proclamation 2676, Granting Pardon to Certain Persons Who Have Served in the Armed Forces of the United States, Dated the 24th day of December 1945. The full text of this Proclamation 2676 is set out at pages 42, 43, 44 of the record.

SPECIFICATION OF ERRORS

The United States Court of Appeals for the District of Columbia Circuit erred in the following particulars:

1. In sustaining the trial court's ruling, which permitted the government prosecutor to impeach the credibility of the defendant, who took the stand as a witness in his own behalf, by allowing said prosecutor, on cross-examination, before the jury, to ask the defendant and inquire of him and obtain an affirmative answer thereto, about a prior conviction, when said defendant had, previously, prior to his indictment herein, received a full pardon from the President of the United States pardoning him of and from said prior conviction.

2. In holding that the defendant's right to a fair and impartial trial was not unlawfully prejudiced by the conduct and closing arguments of the prosecutor, who referred to and argued mainly, wholly irrelevant matters, not related to the issues in the case, over objection of defendant, and which were calculated only to arouse the suspicion, passion, and prejudice of the jury against the defendant and even his counsel. And the Circuit Court further erred in failing to find that the trial court below should have stopped the prosecutor *sua sponte*, and also upon objection of defendant, from making such arguments which were solely designed to arouse the suspicion, passion and prejudice of the jury against the defendant.

STATEMENT OF THE CASE

1. The petitioner was indicted and convicted on a one count indictment (R. 3), charging him with grand larceny. During the trial of the case and the presentation of the defendant's case before the Court and jury, the defendant took the witness to testify in his own behalf and defense (R. 23-29). During cross-examination by the prosecutor, and over the vigorous objection of defendant, the said prosecutor sought to impeach the credibility of the defendant as a witness, by interrogating said defendant and obtaining an affirmative answer from him to said questions, concerning a prior conviction of the defendant for a crime against the United States allegedly committed on January 5, 1942 (R. 29). Notwithstanding the positive objections of the defendant thereto and notwithstanding the fact that both the Court and the prosecutor were fully aware of the unequivocal fact that the defendant had received a full pardon by the President of the United States, for the alleged offense committed on January 5, 1942, the trial court permitted the prosecutor to ask the defendant upon cross-examination, questions concerning defendant's conviction of the alleged offense on January 5, 1942, and the trial court permitted the prosecutor to extract an affirmative answer to said questions from the defendant before the jury. (R. 26, 27, 29). Subsequent to this stage of the trial, the Presidential Proclamation of Pardon, pardoning the defendant, was offered in evidence (R. 42, 43, 44), as were the honorable discharges of the defendant from the United States Army (R. 41, 42).

2. At the conclusion of all evidence offered in the trial of the case, the prosecutor made two closing arguments to the jury, namely his opening closing argument and his rebuttal final closing argument, the latter made after defendant's final address to the jury.

During the course of both of said prosecutor's closing arguments to the jury, he made, over objection of defendant, repeatedly and continuously, prejudicial and wholly irrelevant statements, calculated and designed exclusively and purposely to arouse the suspicion, passion, and prejudice of the jury against the defendant (R. 31-36). During these said closing arguments to the jury by the prosecutor, the trial court failed to stop the prosecutor *sua sponte*; and the trial court failed to stop the prosecutor upon objection of the defendant. (R. 35). Notwithstanding the presence of the trial court and notwithstanding the objections of defendant, the prosecutor continuously and repeatedly made baseless charges against, and prejudicial remarks against, the defendant and defendant's counsel, in the face of the fact that these baseless charges and prejudicial remarks, uttered so recklessly and unconcernedly before the jury, were unsupported by any evidence in the case. At no time during the closing arguments of the prosecutor did the Court stop the prosecutor or order him to cease and desist from making these baseless remarks, nor did the court require the prosecutor to correct or temper his statements to the jury in his closing arguments. (31-36).

ARGUMENT

1. The Trial Court Erred in Allowing the Prosecutor to Impeach the Credibility of the Defendant as a Witness in His Own Behalf.

The prosecution was permitted, over objection, to inquire, and the defendant, a witness in his own behalf, was compelled to answer, questions concerning a previous conviction on January 5, 1942. The obvious purpose of these questions by the prosecutor on cross-examination was to impeach the credibility of the defendant before the jury. We submit that the court clearly erred

in permitting the prosecutor to introduce into evidence such testimony extracted from the defendant when both, the prosecutor and the court, prior to such interrogation of defendant, knew, and were aware of the fact, that the defendant had received a full pardon from the President of the United States of and from said prior conviction. (R. 26, 27, 29).

It was the duty of the trial court to recognize the full pardon (R. 42, 43, 44) as a prohibition to any such line of inquiry by the prosecutor; and thus the court should have sustained any and all objections on the part of defendant to the prosecutor's asking of any questions, or pursuing any lines of inquiry seeking to show or reveal the record of conviction of the defendant on January 5, 1942.

In *Ex parte Garland*, 4 Wall. 333, 71 U. S. 333, the court said:

> "A pardon reaches the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt so that in the eye of the law the offender is as innocent as if he has never committed the offense."

In the case of *Carlisle v. United States*, 16 Wall. 147, 83 U. S. 426, the court speaking through Mr. Justice Field said:

> "There has been some difference of opinion among the members of the court as to cases covered by the pardon of the President, but there has been none as to the effect and operation of pardon in cases where it applies. All have agreed that the pardon not merely releases the offender from the punishment prescribed for the offense, but that it obliterates in legal contemplation the offense itself."

The case at bar does not deal alone with the competency of the defendant to be a witness in the light

of his previous conviction on January 5, 1942; nor does the full Presidential pardon give the defendant a greater competency as a witness. It was decided long ago in *Boyd v. United States*, 142 U. S. 450, 453, that a conviction for a previous offense does not destroy a person's competency as a witness. The point here is, we contend, that not only was the defendant a competent witness to testify in his own behalf, but more than that, in the light of the full Presidential pardon which he received, the previous conviction should no longer be available in the administration of the criminal law to impeach the defendant's credibility as a witness.

We submit that to permit the pardoned crime thus to be used on a trial for an entirely different offense is inconsistent with the nature and effect of a full Presidential pardon as described heretofore in cases decided by this court. *U. S. v. Wilson*, 7 Pet. (32 U. S.) 150; *Ex parte Garland, supra; Carlisle v. U. S., supra; U. S. v. Klein*, 13 Wall. (80 U. S.) 128; *Osborn v. U. S.*, 91 U. S. 474; *Boyd v. U. S., supra; Young v. U. S.*, 97 U. S. 39; *Ex parte Wells*, 18 How. (59 U. S.) 307, 315.

Art. 2, Sec. 2, of the Constitution of the United States, provides that the President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. We respectfully submit that the full pardon granted petitioner on December 24, 1945 by the President of the United States was in full conformity with this executive power granted unto the President by the United States Constitution. We submit that the pardon was not conditional, but that the operative part of the pardon stated that it is "a full pardon".

Petitioner submits that the intent and purpose of the President in granting this pardon to him, made his credibility as a witness, testifying in his own behalf, unim-

peachable for any purpose whatsoever, so far as his previous conviction on January 5, 1942 was concerned herein. See *U. S. ex rel Palermo v. Smith,* 17 F. 2d 534; *U. S. v. Commanding Officer of 78th Division, U. S. A.,* 252 F. 314; *U. S. ex rel Consola v. Karnuth,* 27 F. Supp. 461, affirmed C. C. A. 108 F. 2nd 178; *Bennett v. U. S.,* 88 Ct. Cl. 602; and *In Re Ringnalda,* 48 F. Supp. 975.

We submit that in the case at bar the fact of defendant's previous conviction, was not and could not be material on the question of his credibility as a witness in his own behalf, in the light of the receipt of his full Presidential pardon. We submit that the full Presidential pardon should and did obviate and destroy any right or opportunity of the prosecutor to attack the credibility of the defendant as a witness in his own behalf. Petitioner submits that knowledge of the full Presidential pardon by the prosecutor gave the prosecutor no more right to inquire of the defendant concerning his previous conviction on January 5, 1942, than had the prosecutor the right to inquire and ask if the defendant had merely been arrested or had he been indicted on a given date. In other words, in the light of the full pardon, we submit that the law made the defendant's credibility as a witness, unimpeachable, and that the decisions and the law applicable to this particular point always so intended that the law should speak thusly, to protect the rights of this defendant.

We submit that the act of the trial court in permitting the defendant to admit the pardon in evidence, after the jury heard the defendant's admission of his previous conviction, when the same was extracted from him on cross-examination, did not in any way ameliorate the offense against, and the legal error committed against the rights of the defendant in his trial before the jury. We submit that once the conviction was admitted, destroying defendant's credibility, the admission of the

pardon could in no way restore the same before the jury; on the contrary, the admission of the pardon would seem immaterial at that time, on the question of his credibility.

Both the majority opinion and the dissenting opinion of the United States Court of Appeals for the District of Columbia Circuit state that the precise question raised in this case herein, concerning the effect of the full Presidential pardon granted to this petitioner has not heretofore been decided by this Court.

2. The Trial Court Erred in Allowing the Prosecutor to Argue Wholly Irrelevant Facts and Issues Not Based on Any Evidence, and Only for the Purpose of Arousing Suspicion, Passion, and Prejudice Against the Defendant in the Minds of the Jury.

During the closing arguments of the prosecutor to the jury at the conclusion of the case, he repeatedly and continuously made unfounded statements concerning the defendant, and even his counsel, which were solely designed and calculated to arouse the suspicion, passion, and prejudice of the jury against the defendant. (R. 31-36). The failure of the trial court *sua sponte* to stop the prosecutor and cause him to forthwith cease and desist from making baseless statements not founded in nor supported by any evidence in the case, precluded the defendant from having a fair trial and denied unto the defendant his right to due process of law in this case. (R. 35). Not only did the trial court fail to act *sua sponte* to preclude and avoid this prejudicial error, to defendant's right to a fair and impartial trial, but the trial court, even in the light of objections to such argument by defendant's counsel, failed to stop the prosecutor from making repeated utterances and remarks not supported by any evidence, and calculated only to arouse the suspicion, passion and prejudice of the jury against the defendant. (R. 31-36).

This court has previously stated on more than one occasion that a prosecutor cannot run amuck and lose sight of his sworn duty to protect the defendant, by prosecuting him fairly, only fairly, and in no other way. In the case of *Viereck v. U. S.*, 318 U. S. 236, the court said:

> "The defendant's right to a fair trial in this case was prejudiced by the conduct of the prosecutor, who in his closing remarks to the jury indulged in an appeal wholly irrelevant to any facts or issues in the case, and the only purpose and effect of which could have been to arouse passion and prejudice. Such remarks should have been stopped by the trial judge *sua sponte*."

The court further said in the case of *Viereck v. U. S.*, supra:

> "It is as much the duty of the prosecutor to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

We submit, that in the case at bar, the prosecutor, violated his duty to the defendant and to the court, and went far afield from the issues in the case. It was plain error for the court to so permit the prosecutor, even to start such an improper argument, and it was most certainly error by the court to permit the prosecutor to continue such an argument.

In the case of *Berger v. U. S.*, 295 U. S. 78, the court said:

> "Misconduct of a U. S. Attorney in his cross-examination of witnesses and address to the jury, in a criminal case, may be so gross and persistent as to call for stern rebuke and repression—even for the granting of a mistrial—by the trial judge; and when not so counteracted, it may require the reversal of a conviction, particularly when weakness of the case accentuates the probability of prejudice to the accused."

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted

JOSIAH LYMAN,
711 14th Street, N. W.,
Washington, D. C.

KATHRYN M. SCHWARZ,
1346 Connecticut Ave. N.W.,
Washington, D. C.
Attorneys for Petitioner

SOPHIE B. LYMAN
711 14th Street, N. W.,
Washington, D. C.
Of Counsel

INDEX

	Page No.
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provision, rule, and statute involved	2
Statement	3
Argument	5
Conclusion	12

CITATIONS

Cases:

Bennett v. *State*, 24 Tex. App. 73	6, 7
Boyd v. *United States*, 142 U.S. 450	8
Bryant v. *United States*, 257 Fed. 378	6
Carlesi v. *People of New York*, 233 U.S. 51	10
Carlisle v. *United States*, 16 Wall. 147	9
Commonwealth v. *Green*, 17 Mass. 515	6, 7
Consola, United States ex rel. v. *Karnuth*, 27 F. Supp. 461, affirmed, 108 F. 2d 178	9
Curtis v. *Cochran*, 50 N.H. 242	6, 7
Garland, Ex parte, 4 Wall. 333	9
Martin v. *Commonwealth*, 25 Ky. L. Rep. 1928	6
Osborn v. *United States*, 91 U.S. 474	9
Palermo, United States ex rel. v. *Smith*, 17 F. 2d 534	9
People v. *Hardwick*, 204 Cal. 582	6
Readings Trial, 7 How. St. Tr. 259	7
Ringnalda, In re, 48 F. Supp. 975	9
Rookwood's Case, Holt 683, 90 Eng. Repr. 1277	7
Schwartz, United States ex rel. v. *Commanding Officer*, 252 Fed. 314	9
State v. *Grant*, 3 W.W. Har., Del. 195	6
Territory v. *Chavez*, 8 N.M. 528	6, 7
United States v. *Jones*, 26 Fed. Cas. 644, No. 15,493	6, 7
United States v. *Klein*, 13 Wall. 128	9
United States v. *Wilson*, 7 Pet. 150	6
Vedin v. *McConnell*, 22 F. 2d 753	6
Wallamet R.T. Co. v. *Oregon S.N. Co.*, 29 Fed. Cas. 88, No. 17,106	6
Wells, Ex parte, 18 How. 307	9
Werner v. *State*, 44 Ark. 122	6
Young v. *United States*, 97 U.S. 39	9

Constitution, Statutes and Rule:

	Page
Constitution, Article II, Sec. 2	2
District of Columbia Code (1940 ed.) § 14-305; 31 Stat. 1357, c. 854, § 1067; 32 Stat. 540, c. 1329	3
Federal Rules of Criminal Procedure, Rule 26	2, 6

Miscellaneous:

2 Hale, *Pleas of the Crown*, II, 278	7
28 Harv. L. Rev. 647	6
88 U. of Pa. L. Rev. 177	6
2 Wigmore, *Evidence* (1st ed., 1904), pp. 1101-1102, 1105-1106; §§ 979, 980(1); p. 1107, § 980(3), (5); p. 1125, § 986(4), fn. 17, now in 3 Wigmore, *Evidence* (3d ed., 1940), under same sec. nos.	6
2 Wigmore, *Evidence* (3d ed. 1940), pp. 609-612, § 519	8
3 Wigmore, *Evidence* (3d ed. 1940), p. 570, § 986(4), fn. 17	7
3 Wigmore, *Evidence* (3d ed. 1940), pp. 532-533, 536-538, 543, §§ 979, 980(1) 980(3)	8

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 544

ROBERT L. RICHARDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (R. 46-58) are reported at 192 F. 2d 602. The opinion of the District Court is reported at 91 F. Supp. 323.

JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 1951 (R. 59). A petition for rehearing in banc (R. 60-66) and a motion to

strike the petition for rehearing were denied on December 19, 1951 (R. 67). The petition for a writ of certiorari was filed on January 18, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether a general presidential pardon extended to those serving for a year in the armed forces prevents the operation of the rule that when a defendant takes the stand he may be questioned concerning a past conviction of crime as a circumstance affecting his credibility.

2. Whether petitioner was improperly prejudiced by the prosecutor's closing argument.

CONSTITUTIONAL PROVISION, RULE, AND STATUTE INVOLVED

The Constitution of the United States, Article II, Section 2:

> The President * * * shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

* * * * *

Rule 26, F.R. Crim. P.:

> * * * The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be inter-

preted by the courts of the United States in the light of reason and experience.

District of Columbia Code (1940 ed.) § 14-305; 31 Stat. 1357, c. 854, § 1067; 32 Stat. 540, c. 1329:

> No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde; * * *

STATEMENT

Petitioner was convicted of grand larceny, in the United States District Court for the District of Columbia, and was sentenced to imprisonment for a term of 13 months to 5 years (R. 3, 10-11). On appeal, the judgment was affirmed (R. 59, 67), one judge dissenting. The indictment charged that on or about February 9, 1950, petitioner stole an automobile worth $1,250 (R. 3) and the evidence disclosed that on February 17, 1950, petitioner sold the stolen car for $1100 under serial numbers admittedly transferred from a wrecked car which he owned (R. 14-16).

Petitioner's evidence was to the effect that he had bought a wrecked car for approximately $400 and then hired one Nichelson, through the United States Employment Bureau, to repair it (R. 15, 19, 23-24, 29); that Nichelson had brought in the stolen car, claiming that it had been purchased for approximately $300 supplied him for the purpose

by petitioner (R. 20, 25); that petitioner had not known of the theft and had thought the car he sold to be the wrecked car reequipped with the body of the purchased car (R. 21, 26, 28, 30).

When petitioner took the stand, he was questioned concerning his conviction for automobile theft in 1942 (R. 26, 29). In objection to this questioning, he showed himself to be within the terms of a presidential proclamation issued December 24, 1945, which recited that persons convicted of federal offenses, who were honorably discharged from the armed forces after service for a year, "ought to have restored to them the political, civil, and other rights of which they were deprived by reason of such conviction and which may not be restored to them unless they are pardoned." The proclamation granted a "full pardon" to such persons (R. 26-27, 41-44, 10 Fed. Reg. 15409). The trial judge ruled that the pardon was admissible but that petitioner's prior conviction could also be shown (R. 27, 37).

Petitioner testified that Nichelson had disappeared after the automobile transaction (R. 27), but admitted that, in response to a telephone call from New York, he had wired Nichelson $50 (R. 25-26, 29-30). Petitioner had refused to give the police the address, according to the following testimony of the police (Tr. 133-134)[1]:

---

[1] The designation "Tr." refers to the typewritten transcript of testimony on file with the Clerk of this Court.

Q. You learned from [petitioner] that [Nichelson] was in New York, did you not?

A. He was supposed to be in New York, yes, sir.

Q. Do you understand my question, sir? You learned from this [petitioner] that he was actually in New York?

A. He refused to give us the address in New York.

Q. Did he have the address in New York?

A. He did, sir.

The police were unable to obtain Nichelson's address from the telegraph company without petitioner's permission. Both petitioner and his counsel refused to give such permission to the police. (Tr. 433-435, 440.)

In the course of the Government's closing arguments to the jury, the prosecutor insisted, over objection of petitioner, that the evidence showed a withholding of Nichelson's address and that such withholding impugned the credibility of petitioner's testimony that Nichelson alone had perpetrated the theft (R. 31-36).

ARGUMENT

1. Petitioner contends that a novel question is presented to this Court in that the trial judge permitted impeachment of petitioner's credibility by questioning concerning a conviction of a past crime which was within the scope of a general presidential pardon extended to all those who had served in the armed forces for a year. Such im-

peachment raises no novel question, but is, instead, sanctioned by a rule so well settled in the law for so long a period of time that we find no instance of the issue having been raised beyond the lower federal courts. These courts, and the state courts in which the question has been raised, have unanimously resolved the question adversely to petitioner's contention in both their decisions and dicta.[2] Moreover, the careful analyses of Professor Wigmore, as early as 1904,[3] of Professor Williston in 1915 (28 Harv. L. Rev. 647, 654), and Professor Weihofen in 1939 (88 U. of Pa. L. Rev. 177, 183-184) have long since disposed of any theoretical aspects of petitioner's contention.

In testing what the President intended as the scope of the general "full pardon," reference must be made to the common law scope of the pardoning power which was granted to the President in the Constitution. *United States* v. *Wilson,* 7 Pet. 150, 159-160; Rule 26, F.R. Crim. P. Since the earliest expressions of the common law, it has been recognized that the use of a prior conviction

[2] *Bryant* v. *United States,* 257 Fed. 378, 383 (C.A. 5); *Vedin* v. *McConnell,* 22 F. 2d 753, 754 (C.A. 9); *United States* v. *Jones,* 26 Fed. Cas. 644, 648, No. 15,493 (D.N.Y.); *Wallamet R. T. Co.* v. *Oregon S. N. Co.,* 29 Fed. Cas. 88, 90, No. 17,106 (D. Ore.); *Werner* v. *State,* 44 Ark. 122, 127-129; *People* v. *Hardwick,* 204 Cal. 582, 589, 590-594; *State* v. *Grant,* 3 W.W. Harr., Del. 195, 197-198; *Martin* v. *Commonwealth,* 25 Ky. L. Rep. 1928, 1930; *Commonwealth* v. *Green,* 17 Mass. 515, 548; *Curtis* v. *Cochran,* 50 N.H. 242, 244-245; *Territory* v. *Chavez,* 8 N.M. 528, 533-534; *Bennett* v. *State,* 24 Tex. App. 73, 78-80.

[3] 2 Wigmore, *Evidence* (1st ed., 1904), pp. 1101-1102, 1105-1106, §§ 979, 980(1); p. 1107, § 980(3), (5); p. 1125 § 986(4), fn. 17, now in 3 Wigmore, *Evidence* (3d ed., 1940), under same section numbers.

to impeach a witness would not be prevented by a pardon. 2 Hale, *Pleas of the Crown,* 278; *Rookwood's Case,* Holt 683, 685, 90 Eng. Repr. 1277, 1278; 3 Wigmore, *Evidence* (3d ed. 1940), p. 570, § 986(4), fn. 17.[4] And this has been recognized, without any question concerning inconsistency, in cases dealing with the effect of a pardon to remove the total incompetence of a witness.[5]

There is sound basis for the rule, in reason as well as historical precedent. The rule against allowing impeachment by examination concerning past misconduct which has not been adjudicated is based upon the undesirability of trying an additional case or many additional cases in the particular proceeding before the court. The rule obviously is inapplicable if the past conduct has already been tried and judged, for in such a case, the current trial would be extended only to the small degree involved in showing the conviction. 3 Wigmore, *Evidence* (3d ed. 1940), pp. 532-533, 536-538, §§ 979, 980(1). Where, as here, a pardon is

[4] Wigmore's citation of *Reading's Trial,* 7 How. St. Tr. 259, 296, as the one case contra, is subject to the question whether that case involved a past conviction, rather than mere testimony about a past criminal act; the witness was asked "did you lay in provisions of fire * * * to burn the city" and the Lord Chief Justice objected, *inter alia,* that the witness was being made to accuse himself, which would not have been an appropriate comment if the witness had already been convicted.

[5] See, *supra,* 2 Hale, *Pleas of the Crown,* 278; *Rookwood's Case,* Holt 683, 685, 90 Eng. Repr. 1277, 1278; *United States* v. *Jones,* 26 Fed. Cas. 644, 648, No. 15,493; *Commonwealth* v. *Green,* 17 Mass. 515, 548; *Curtis* v. *Cochran,* 50 N.H. 242, 244-245; *Territory* v. *Chavez,* 8 N.M. 528, 533-534; *Bennett* v. *State,* 24 Tex. App. 73, 79-80.

not addressed to the issue of guilt, the completely decided aspect of the past fact remains untouched and is available as unquestioned evidence. 3 Wigmore, *Evidence* (3d ed. 1940), p. 543, § 980(3).

Petitioner's argument confuses the considerations involved in testing the credibility of a witness with the considerations implicit in the ancient rule of total incompetence as a witness of a person convicted of a crime. The total exclusion of a witness rested upon different origins, and has long been repugnant to the basic policy of eliciting all relevant evidence so long as the evidence is tested by effective means. There has, accordingly, been a breaking down of this total exclusion by statute. 2 Wigmore, *Evidence* (3d ed., 1940), pp. 609-612, § 519. And it was only to be expected that, at an earlier time, when the exclusion was still applied, its application would be narrowed by denying it effect where a pardon had intervened.[6] The fact that a convict's testimony should be admitted for what it is worth is not inconsistent with, but is dependent upon, the most careful testing of that evidence by all relevant means, including particularly the significant history of the witness' proven past misconduct. There is, accordingly, a sound basis for the unbroken line of decisions adhering to this logical difference of approach on the question of credibility.

---

[6] *Boyd* v. *United States*, 142 U.S. 450, so held without discussing the basis of the holding at any great length.

The general language invoked by petitioner (Pet. 11-13) from decisions of this Court dealing with reconstruction era legislation is inapplicable. In those cases, this Court held that what was attempted was punishment with respect to the pardoned offense of assisting the confederate cause—punishment by such clearly penal measures as total barring from law practice (*Ex parte Garland,* 4 Wall. 333, 380) or barring from the usual recovery of property taken over during the war (*United States* v. *Klein,* 13 Wall. 128, 147; *Carlisle* v. *United States,* 16 Wall. 147, 153; *Osborn* v. *United States,* 91 U. S. 474, 477).[7] Nothing in the nature of a penalty is here involved. It may be that the total incompetence of a witness by reason of a prior conviction was in large part of a penal nature (see Wigmore, *op. cit.*), but not so the mere use of a

---

[7] *Young* v. *United States,* 97 U.S. 39, 66, merely interpreted a general pardon as not applying to an English citizen. And the language of *Ex parte Wells,* 18 How. 307, cannot be applied beyond the decision's holding that the pardoning power included the right to attach conditions. *United States ex rel. Palermo* v. *Smith,* 17 F. 2d 534, 535 (C.A. 2), and *United States ex rel. Consola* v. *Karnuth,* 27 F. Supp. 461, 463, affirmed, 108 F. 2d 178 (C.A. 2), were concerned only with statutory construction of a deportation enactment, and held that Italian and Canadian pardons, respectively, were not included in the pardons specifically given effect by the act. *United States ex rel. Schwartz* v. *Commanding Officer,* 252 Fed. 314, 316 (D.N.J.), held, as against a convict's claim for draft deferment, that a pardoned crime should not deprive him of one of the "greatest privileges, to bear arms in the defense of his country." *In re Ringnalda,* 48 F. Supp. 975, 977 (S.D. Cal.), merely held that probation, as distinguished from conviction, would not prevent naturalization under the terms of the particular enactment.

conviction as one element to be considered on credibility. This latter use has as its clear and only objective the eliciting of truth in a judicial process.

Where, as here, reliance on the pardoned conviction is for a legitimate purpose other than punishment, a more appropriate analogy is to be found in *Carlesi* v. *People of New York,* 233 U.S. 51, in which this Court upheld a state statute penalizing a second offense despite presidential pardon of the first offense and said (pp. 57, 59):

> * * * It is therefore to be conceded that if the act of the State in taking into consideration a prior conviction of an offense committed by the same offender against the laws of the United States despite a pardon was in any just sense a punishment for such prior crime, that the act of the State would be void because destroying or circumscribing the effect of the pardon granted under the Constitution and laws of the United States. And of course, conversely, it must be conceded that if it be that the act of the State in taking into consideration a prior offense committed against the United States after pardon under the circumstances stated was not in any degree a punishment for the prior crime but was simply an exercise by the State of a local power within its exclusive cognizance, there could be no violation of the Constitution of the United States. * * *
>
> * * * * *
>
> * * * we must not be understood as in the slightest degree intimating that a pardon

> would operate to limit the power *of the United States* in punishing crimes against its authority to provide for taking into consideration past offenses committed by the accused *as a circumstance of aggravation* even although for such past offenses there had been a pardon granted. [Italics supplied.]

If a pardoned crime has a continued life as a "circumstance of aggravation" in a later penalty, it assuredly has continued life as a circumstance of credibility. Use of a past conviction to test credibility leaves the pardon fully effective against further punishment but recognizes also that the pardon for reasons not going to the issue of guilt could not change and was never intended to change the fact, established by a full trial, that petitioner had theretofore committed a crime. When that fact becomes pertinent and of value in a judicial proceeding totally unrelated to the past crime, nothing in the executive pardon should interfere, nor was it intended to interfere, with the functioning of the judicial process of the Government.

The pardon was granted to restore petitioner's civil rights. It was a general pardon for service in the army without any consideration of issues of guilt. Such a pardon obviously does not change the fact of conviction. Since that fact is relevant, testimony in regard thereto was properly admitted.

2. Petitioner alleges prejudicial and irrelevant statements by the prosecutor in his closing argument and asserts that the trial judge should have

undertaken, *sua sponte*, to stop the prosecutor (Pet. 3-4, 5, 8, 14-15). The statements in question, we submit, consisted of a clearly proper and temperate argument that petitioner's refusal to give Nichelson's address to the police at the time of the investigation was inconsistent with petitioner's testimony that Nichelson alone had been responsible for the theft of the car. There was evidence to support the Government's argument (*supra*, pp. 4-5) and there was ample opportunity for petitioner to answer the argument if he had any reasonable explanation of his obvious unwillingness to help the police apprehend the purported sole offender.

CONCLUSION

The decision below is correct and no conflict of decisions or new question of importance is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

FEBRUARY 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 988695 771

Supreme Court of the United States

October Term, 1951

No. 544

ROBERT L. RICHARDS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

On March 3, 1952, this Court denied petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

He now petitions the Court to rehear that original Petition and to reconsider the order of denial for cogent reasons, perhaps not satisfactorily set forth, and emphasized and made clear in his original Petition. Petitioner submits that irreparable error was committed during his

trial, in the trial court below, and that as a result thereof, he was denied a fair and impartial trial; and that as an inescapable result of the errors committed by the prosecutor and the trial court below, violence was most certainly done unto the legal rights of the petitioner, and as a direct consequence of the errors complained of, petitioner was denied due process of law, and the protection of his basic constitutional rights.

Petitioner limits his argument in this petition for rehearing to Question No. 1, raised in the Petition for Writ of Certiorari.[1] The particular question involved was that the trial court below allowed, and by questions, the government prosecutor did impeach the credibility of the defendant (petitioner), who took the stand as a witness in his own behalf, when said government prosecutor, on cross-examination of the said defendant, inquired about a previous conviction, and said defendant made affirmative answer thereto, notwithstanding the known fact (known to Court and prosecutor), that said defendant had, previously, prior to his indictment in the present case, received a full pardon from the President of the United States, absolving said defendant from and obliterating said prior conviction.

Petitioner believes it essential to state that numerous questions of error were raised in the trial court. All are not sought to be reviewed here. Of these numerous errors, a goodly number were cited in the Brief on Appeal and argued in the Circuit Court below. Some of the questions argued below were novel, and petitioner submits that the particular question raised here on rehearing is one upon which this Court had heretofore not rendered an opinion; and others, petitioner submits, would have warranted a reversal in the light of decisions

---

[1] See pages 2 and 8 of Petition for Writ of Certiorari, and pages 10-14 thereof for argument on the question involved.

of the United States Court of Appeals for the District of Columbia Circuit and this Court. The Circuit Court below split in its opinion regarding the vital question raised here on rehearing and in the petition for Writ of Certiorari. Circuit Court Judge Fahy wrote a powerful and precise dissenting opinion favoring in its entirety the position of the petitioner with respect to the question raised herein. Petitioner respectfully suggests that the view of Circuit Judge Fahy should be the law governing the question raised herein and does again call the attention of this Court to this fact in this petition for rehearing.

Petitioner submits that the question raised here on rehearing is one of general importance and wide scope and warrants the consideration of this Court and an opinion by this Court on this question, because of the national effect of such a decision throughout the entire country in the Federal system. The question raised here on rehearing and in the petition for Writ of Certiorari is one which is basically rooted in the Constitution of the United States and its interpretation by this Court, and it does fundamentally affect and concern the constitutional rights of the petitioner herein. The particular question raised here concerns Article 2, Section 2 of the Constitution of the United States, and petitioner submits that this Court should consider this question raised herein and should decide the same.

The filing of the Petition of Writ of Certiorari by the petitioner in this case sought to have the issues and questions of law raised therein considered by this Court in the light of precedent and reason. The majority opinion written by Circuit Judge Washington states: (R. 50)

> "The United States Supreme Court has not, it is true, had occasion to pass squarely on the question here presented."

The dissenting opinion written by Circuit Judge Fahy states: (R. 53)

> "To permit the pardoned crime thus to be used on trial for an entirely different offense seems to me to be inconsistent with the nature and effect of a full Presidential pardon as described in Supreme Court cases, though the precise question before us has not been decided by that Court."

The text writers on Federal and Supreme Court practice whose expansive and learned works are the result of years of toil have tried vainly to solve for us, whose practice does not lend frequency to appearance before our highest tribunal, the mysteries of "getting the Court's ear" on petitions for Writs of Certiorari. One of the paths to the Court's "ear" in the "Daedalian maze of rules" suggested by the informed writers is to demonstrate that the case *is important.* The importance must not be to an individual, they say, but must be more in the nature of a "class action" so to speak. We submit that, in addition, notwithstanding writers to the contrary, that this Court seeks to and does protect the rights of an individual such as petitioner here. The petitioner most certainly is entitled to a full measure of due process of law during the trial of his case. During the trial proceedings, petitioner was entitled to a trial warranting absolute freedom from the damaging effects and results of errors, and prejudice to his legal rights not permitted or sanctioned by the law. The Petition for Writ of Certiorari[2] set forth abundant reasons and facts noting the error committed by the trial court below, complained of here, and for which petitioner seeks rehearing and review by this Court.

---

[2] See pages 10-14 of Petition for Writ of Certiorari.

Chief Justice Hughes made this observation about certiorari in 1937:[3]

> "I think it safe to say that about sixty percent of the applications for certiorari are wholly without merit and ought never to have been made. There are about twenty percent or so in addition which have a fair degree of plausibility, but which fail to survive a critical examination. The remainder falling short of twenty percent show substantial grounds and are granted. I think that (it) is the view of the members of the Court that if any error is made in dealing with these applications it is on the side of liberality."

Certainly this case cannot be considered to have been treated "on the side of liberality." Furthermore, this case cannot be considered to have fallen in the sixty percent as being "without merit." Petitioner submits that this case involves a question of general importance and consequence, and directly involves a Federal question, to-wit, an interpretation of a provision of the Constitution of the United States as affecting the fundamental and substantial rights of this petitioner. Consequently, we submit, this case must necessarily in all fairness fall in the coveted twenty percent which calls for review.

---

[3] Letter from Chief Justice Hughes to Senator Wheeler, March 23, 1937, reprinted 81st Cong. Rec. 2814-5 (1937).

CONCLUSION

Petitioner prays that the Court reconsider its Order of Denial, and grant his Petition for a Writ of Certiorari in this cause.

JOSIAH LYMAN,
711 14th Street, N. W.,
Washington, D. C.

KATHRYN M. SCHWARZ,
1346 Connecticut Ave., N. W.
Washington, D. C.
Attorneys for Petitioner.

SOPHIE B. LYMAN,
711 14th Street, N. W.,
Washington, D. C.
Of Counsel

I hereby certify that this Petition for rehearing is presented in good faith and not for purposes of delay, and that the Petition is restricted to the argument of substantial grounds available to petitioner but not previously emphasized or presented.

JOSIAH LYMAN,
KATHRYN M. SCHWARZ,
Attorneys for Petitioner.